COURT OF APPEALS
DECISION
DATED AND FILED

October 14, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP359 **Cir. Ct. No. 2014CV478**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

CITY OF MEQUON,

PLAINTIFF-RESPONDENT,

V.

LUKE J. CHIARELLI,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County: JOSEPH W. VOILAND, Judge. *Affirmed*.

¶1 REILLY, P.J.[1] Luke Chiarelli refused to submit to a chemical test of his breath after he was arrested for operating a motor vehicle while intoxicated. Chiarelli requested judicial review of the legality of his refusal, arguing that the police had neither reasonable suspicion nor probable cause to stop and arrest him and, therefore, had no lawful grounds to request a chemical test of his breath pursuant to WIS. STAT. § 343.305. Following an evidentiary hearing, the court found that Chiarelli's vehicle was lawfully stopped and he was properly arrested. The court revoked Chiarelli's operating privileges for one year and ordered Chiarelli to equip his vehicle with an ignition interlock device for one year. Chiarelli appeals. We affirm.

¶2 At Chiarelli's refusal hearing, City of Mequon Police Sergeant Lindsay Graycarek testified that she was traveling westbound in the left lane of Mequon Road at 2:51 a.m. on March 30, 2014, when she observed a vehicle traveling in the right lane of westbound Mequon Road ahead of her vehicle. As the vehicles passed Homestead High School, Graycarek observed Chiarelli's vehicle deviate into a right-turn lane without turning onto the road. Shortly thereafter, she saw Chiarelli's vehicle deviate into the area close to the curb on the north side of Mequon Road, where the vehicle's tires kicked up dirt and debris before returning to its traffic lane.

¶3 Graycarek stopped the vehicle and identified Chiarelli as the driver. Graycarek smelled the odor of alcohol emanating from the vehicle. Chiarelli

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

denied drinking but said his passenger had been. Graycarek had Chiarelli exit his vehicle to perform field sobriety tests, and upon Chiarelli exiting the vehicle, Graycarek smelled alcohol emanating from Chiarelli and observed Chiarelli to have bloodshot and glossy eyes. Chiarelli refused to perform any field sobriety tests. Graycarek arrested Chiarelli for operating while intoxicated. Chiarelli and the City stipulated that Graycarek thereafter properly complied with the notification requirements of WIS. STAT. § 343.305(4) and that Chiarelli refused to submit to a chemical test of his breath.

¶4 Graycarek's squad camera video was placed into evidence at the refusal hearing. Both Chiarelli and his passenger testified that their vehicle never hit the curb.

¶5 WISCONSIN STAT. § 343.305(9)(a)5. requires a "lawful" arrest as a basis for requesting a chemical test of one's blood/breath. ***State v. Anagnos***, 2012 WI 64, ¶43, 341 Wis. 2d 576, 815 N.W.2d 675. An accused may challenge both reasonable suspicion to stop and probable cause to arrest at a refusal hearing. ***Id.***, ¶42. On appeal, Chiarelli argues the stop of his vehicle was unlawful as the squad camera video does not support Graycarek's testimony that his vehicle deviated from its lane of travel on two occasions and as Graycarek had nothing more than an inchoate and unparticularized suspicion that he was operating while intoxicated. *See* ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681(1996). We disagree.

¶6 When evidence in the record consists of disputed testimony and a video recording, we apply the clearly erroneous standard of review in reviewing the trial court's findings of fact. ***State v. Walli***, 2011 WI App 86, ¶17, 334

Wis. 2d 402, 799 N.W.2d 898. We review de novo whether those facts support the court's ultimate finding on the constitutionality of a traffic stop. ***Id.***, ¶10.

¶7 In ***Walli***, the officer testified that he observed Walli's vehicle cross the center line. ***Id.***, ¶3. The parties disagreed as to what the video showed. ***Id.***, ¶14. We concluded that the standard of review to apply when confronted with such a situation is the clearly erroneous standard of review. ***Id.*** Under this standard, the trial court's finding of fact will not be set aside unless "it is against the great weight and clear preponderance of the evidence." ***State v. Arias***, 2008 WI 84, ¶12, 311 Wis. 2d 358, 752 N.W.2d 748 (citation omitted).

¶8 We have reviewed the video from Chiarelli's refusal hearing and conclude that it shows the trial court's factual findings, which were based on Graycarek's testimony, were not clearly erroneous. While the images on the video are not explicitly clear, it does appear that Chiarelli's vehicle moves to the right into the turn lane near the sign for Homestead High School and thereafter does appear to raise dust or debris as it comes close to the curb on Mequon Road. Based upon the sworn testimony of all witnesses and the squad camera video, we conclude the court's factual findings are not clearly erroneous.

¶9 Moreover, we find that these facts provided a lawful reason to stop Chiarelli's vehicle. It is well settled that an investigative traffic stop may be justified by reasonable suspicion even when the officer did not observe the driver violate any law. ***Anagnos***, 341 Wis. 2d 576, ¶47. In evaluating whether there is reasonable suspicion for a stop, the officer must have more than an "inchoate and unparticularized suspicion or 'hunch.'" ***State v. Post***, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (quoting ***Terry v. Ohio***, 392 U.S. 1, 27 (1968)). The officer "must be able to point to specific and articulable facts which, taken

together with rational inferences from those facts, reasonably warrant" the traffic stop. ***Id.*** (quoting ***Terry***, 392 U.S. at 21). This determination is based on "whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime." ***Id.***, ¶13.

¶10 Our supreme court in ***Post*** was faced with similar facts as were before the trial court at Chiarelli's refusal hearing. In ***Post***, a police officer witnessed a vehicle at 9:30 p.m. that was "'canted' such that it was driving at least partially in the unmarked parking lane." ***Id.***, ¶4. The officer followed Post's car and observed the vehicle continue to weave in an "S-type" pattern between the center line and the parking lane for two blocks. ***Id.***, ¶5. The officer later testified that the manner of Post's driving was a "clue that he may be intoxicated." ***Id.***

¶11 The ***Post*** court acknowledged that "weaving within a single lane can be insignificant enough that it does not [alone] give rise to reasonable suspicion" and, further, that the officer "did not observe any actions that constituted traffic violations or which, considered in isolation, provided reasonable suspicion that criminal activity was afoot." ***Id.***, ¶¶19, 28. However, when the court considered the totality of the circumstances, including crossing over into the parking lane, weaving within the single lane, and the time of night, it concluded that the officer "presented specific and articulable facts, which taken together with rational inferences from those facts, give rise to the reasonable suspicion necessary for an investigative stop." ***Id.***, ¶37.

¶12 In this case, Chiarelli's deviations from his lane of traffic on two occasions within a short distance, once nearly striking the curb, at close to 3 a.m., constitute specific and articulable facts that suggest impairment and from which a

reasonable officer could infer that something unlawful might be afoot warranting a brief investigatory stop. Following this lawful stop, Graycarek's additional observations of the smell of alcohol upon Chiarelli, Chiarelli's bloodshot and glossy eyes, and Chiarelli's refusal to perform field sobriety tests, *see* ***State v. Babbitt***, 188 Wis. 2d 349, 359-60, 525 N.W.2d 102 (Ct. App. 1994), provided her with probable cause to arrest Chiarelli for operating while intoxicated. His subsequent refusal of a chemical test of his breath was unreasonable.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.